No. 369

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 9024

IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON

C. H. SPRAGUE & SON, INC., a Corporation,
Plaintiff Below,

v.

PRICE HILL COLLIERY CO., a Corporation,
Defendant Below,
ERNEST K. JAMES, State Tax Commissioner,
Appellant,
MUNICIPAL ACCEPTANCE CORPORATION, a Corporation, JOSEPHINE D. TUCKER, HENRY J. TUCKER, ASHTON FILE, ET ALS,
Appellees.

Brief of Counsel for Municipal Acceptance Corporation, Josephine D. Tucker, Henry J. Tucker and Ashton File, Appellees.

POPPENHUSEN, JOHNSTON, THOMPSON, & RAYMOND,
Counsel for Municipal Acceptance Corporation and Ashton File.
FILE, SCHERER & FILE,
Counsel for Municipal Acceptance Corporation, Josephine D. Tucker and Henry J. Tucker.

WOODYARD PRINTERS, CHARLESTON, W. VA.

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Brief of Counsel for Municipal Acceptance Corporation, Josephine D. Tucker, Henry J. Tucker and Ashton File, Appellees.

MEMORANDUM

It is submitted that the brief filed on behalf of the appellant does not fully and accurately state the kind of suit, issues and how raised, or how the issues were decided and what the decree of the court was, as required by rule of this

court. It is further submitted that the brief does not state all of the facts necessary to an understanding and fair determination of the sundry questions involved in this cause. To attempt at this point to particularize such omissions would seem to be illogical and because of prolixity would in a large measure fail of its purpose. Rather, we beg to submit a concise statement of so much of the record as will fully present the merits of the cause as we understand it.

STATEMENT OF THE CAUSE — (x) (xx)

This is a suit in equity brought in the Circuit Court of Raleigh County, May 26, 1938, by C. H. Sprague & Son, Inc., a corporation, suing on behalf of itself and all other creditors of Price Hill Colliery Company, also a corporation, against Price Hill Colliery Company for the appointment of receivers to take charge of and administer the assets of the Colliery Company pursuant to the provisions of Code 31-1-82. No one challenged either the purpose or sufficiency of the bill, so that a detailed statement of its allegations would seem to be unnecessary. Suffice it to say that the company was hopelessly insolvent and on that account was unable to further carry on its business of mining and shipping coal. It was beset and harassed, by its legion of creditors, to the extent that the haven of receivership became its only refuge from the storm that threatened to destroy the value of its assets to its creditors. It is important, however, to state that the bill charged that the assets of the company were of greater value to its creditors if held together, than if dissipated by execution sales at the suit of individual

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(x) Numerals in brackets ( ) and (S) refer to pages of the record and supplemental record, respectively.

(xx) Numerals in brackets (B) refer to pages of brief for appellant.

creditors, and prayed that an injunction issue restraining all creditors of the company from prosecuting suits against it, and also from interferring with the property and assets in the custody of the special receivers.

On May 26, 1938, the plaintiff presented its bill, duly verified, with accompanying exhibits, to the Circuit Court, whereupon a decree was entered appointing H. B. McNary and Fred Dixon special co-receivers of the property and assets of the company, who were thereby directed to take possession thereof and to hold and administer the same subject to the order of the court. This decree also provided that the receivers should prepare a complete inventory ot the assets of the company and cause an appraisement thereof to be made by three disinterested appraisers and file an attested copy thereof with the clerk of the court. The decree also enjoined all persons, firms and corporations from instituting or further prosecuting any actions at law or suits in equity against the company, or from in any manner interferring with the possessions by the special receivers of such property and assets. (7, 9, 5-6).

An order was entered July 13, 1938, authorizing the special receivers to borrow money to pay certain taxes owing by the company, (53-54), but they were unable to obtain such loan. Therefore, an order was entered September 22, 1938, modifying the injunction awarded May 26th to the extent that the sheriff of Raleigh County was left free to distrain for personal property taxes owing by the company in the amount of $2,262.46, (54).

On December 13, 1938, this cause was referred to Harry L. McCreery, a commissioner in chancery, for the purpose of adjudicating the claims which might be properly established against the company and the special receivers, (63).

On February 20, 1939, the commissioner filed his report. (64-71).

It will at once appear from the report of the commissioner that the priority of liens reported by him was on the basis of "general liens" and "specific liens", and that the general liens of the United States and the State of West Virginia for taxes, *other than specific property taxes*, were reported to be liens in the order stated against all of the "*assets*, both real and personal" of Price Hill Colliery Company. (65).

It should be noted in passing that the only *assets* which the company had in properties held by it against which there were specific liens were in the proceeds, if any, arising from the sale of such properties in excess of the amounts required to pay off and discharge such specific liens.

During the progress of the cause, May 18, 1939, the plaintiff filed its amended bill and thereby amplified and made more specific certain allegations of its original bill. (115-120).

ERRORS IN BRIEF FOR APPELLANT

We beg to point out the following erroneous statements made in brief of counsel for appellant in regard to the report of the commissioner and the decrees of March 10 and August 23, 1939. (B5-6).

Neither the report of the commissioner, nor the decree of March 10, gave priority to the lien of the State for gross sales and consumers sales taxes over the lien of the conditional sale contracts by which the diesel engines and equipment were sold, the vendor's lien of Ashton File, or specific liens against specific properties, as stated in the first full paragraph, page 5, of brief for the Tax Commissioner. The

decree of August 23 directed the distribution of the proceeds derived from the sale of *specific properties* against which there were *specific liens* in accordance with the decree of March 10th, so that the statements made on page 5, or elsewhere, in brief for appellant to the contrary are erroneous.

Under the heading "Judgment of Court" (B5), the judgment of the court is said to have been that the proceeds derived from the *sale* of the *property* of Price Hill Colliery Company be first applied to the payment and discharge of the so-called specific liens above mentioned. (67, 69-70). Further that general creditors were given preference over the state for its gross sales and consumers sales taxes.

The foregoing statements are completely at variance with both the decrees of March 10 and August 23d, 1939. (81, 93-99, 167-169). Each of these decrees adjudicated that the *specific liens* against *specific properties* of the company were prior to the liens of the United States and of the State of West Virginia for taxes, other than specific property taxes, but further adjudicated that after the payment of receivership costs and expenses, the United States and the State of West Virginia, in the order stated, held general liens against all of the properties of the company for the payment of such taxes and were decreed to be paid before any other creditors. (93-94). What we have said in regard to erroneous statements made in brief for appellant also applies to similar statements made under the headings "Errors Assigned" and "Statement of the Case". (B6-8).

The following excerpts from these two decrees will more fully and specifically point out the errors into which counsel have fallen in regard to them:

DECREE OF MARCH 10, 1939, WHICH ADJUDICATED THE PRIORITY OF LIENS REPORTED BY THE COMMISSIONER. (81-100).

This decree, specifically referring to the report of the Commissioner, provided:

> It is, therefore, adjudged, ordered and decreed that the report of the said H. L. McCreery, Commissioner in Chancery, and all things therein reported, be and the same are hereby ratified and confirmed, *except as hereafter more specifically* provided by the terms and provisions of this decree. (Italics ours.)

The decree then recites that it appeared to the court that certain findings of fact were necessary for a complete adjudication of the matters and issues in the cause not apparent from the face of the report of the commissioner, and the court proceeded to and did hear evidence introduced in open court, from all of which it was, among other things, ascertained and adjudged:

That Price Hill Colliery Company was insolvent; that the receivership be continued until the further order of the court; that it was to the best interests of the creditors and the stockholders of Price Hill Colliery Company that all of its lands, interest in lands and other properties be sold, and that the proceeds thereof be applied to the payment of the liens and other debts against the lands, interests in lands, and other properties of the company, as thereinafter ascertained and adjudged.

That from said report, the evidence introduced in open court, and from an appraisement of all of the properties of the company made by the appraisers and filed July 9, 1938, it was adjudicated as to what properties, real and personal, were owned and held by the company. (83-93).

Under the heading "GENERAL LIENS AND PRIORITIES" (93), **the decree provided as follows:**

From said report it is further ascertained and adjudged the following constitute liens and priorities in the order named to the persons and in the amounts set forth against all of the lands, interest in lands and other properties of Price Hill Colliery Company as adjudged in this decree.

First. — Receivership costs and expenses as shown by said report and as allowed and approved by a decree of the court entered in these proceedings	$10,693.82
Second. — Taxes due the United States of America:	
(a) For Social Security with interest and penalties computed to June 17, 1938	23,589.10
(b) For National Bituminous Coal Commission under Act of Congress of 1937	224.57
(c) For electrical energy tax to Internal Revenue Collector	10.45
Total First Lien	$23,824.12
Third. — Taxes due the State of West Virginia:	
(a) For corporate license tax approximately	$ 200.00
(b) For gross sales or privilege tax, including penalties	8,013.54
(c) For Consumer's Sales Tax	278.06
Total Third Lien	$ 8,491.60

Fourth. — Unemployment Insurance premiums:
To the State of West Virginia ..... $19,356.85. (93–94).

This decree then proceeded to adjudicate the priority of specific liens against specific properties held by the company as follows:

And from said report it is further ascertained and adjudged that the following *constitute valid and specific liens* against the real estate, interests in real estate and properties of the Price Hill Colliery Company hereinafter specifically set forth to the persons and in the amounts following:

The following real estate taxes assessed in Fayette and Raleigh Counties, West Virginia, upon the following tracts or parcels of real estate assessed on the land books of said county for the years 1937 and 1938, as follows:

FAYETTE COUNTY

McKinley Land Co., 172.60 Knob Branch 1938, 2nd half		$ 13.03
McKinley Land Co., Surf. 12 68		.55
McKinley Land Co., Surf. 12 68 (B. T. 1937)		.59
McKinley Land Co., Min. 338 Boyds Branch Pax		13.27
McKinley Land Co., Min. 4.40 Knob Branch		.79
McKinley Land Co. and H. J. Tucker, 100.19 16 Pax Branch		15.08
McKinley Land Co. and H. J. Tucker, Min. 35 4/10 Pax Branch		5.50
Davis & Fudge et al, 5.80 Pax Branch 4		5.80
Davis & Fudge et al, 5.80 Pax Branch 4		10.17

RALEIGH COUNTY

Sur. pt. Lot 15, Bailey Sub-division	1938	2.08
Sur. 1/10 acre Maple Fork	1937	.44
	1938	.42

T. 106.75 Maple Fork	1937	11.92
	1938	11.04
F. 880 Upper Loup Creek	1937	1,487.50
	1938	2,318.04
F. 220 Upper Loup Creek	1937	143.40
	1938	132.98
F. 14 Maple Fork	1937	9.00
	1938	8.34
M. 106.7 Maple Fork	1937	42.94
	1938	39.80
M. 40.3 Maple Fork	1937	23.16
	1938	21.46
F. 2.1 Maple Fork	1937	1.58
	1938	1.46
F. 0.50 Maple Fork	1937	5.40
	1938	5.00
S. 0.20 Maple Fork	1937	.90
	1938	.84
M. 110 Maple Fork	1937	44.52
	1938	41.26
M. 1 Maple Fork	1937	.90
	1938	.84
M. 17 Loup Creek	1937	13.72
	1938	12.70
M. 18.5 Sewell Seam Loup Ck.	1937	11.92
	1938	11.04
M. 8 Sewell Seam Loup Ck.	1937	5.18
	1938	4.80
M. 3.002 Town District Parcel 2	1937	3.38
	1938	3.12
A. File 0.50 Mineral Maple Fork	1937	.44
	1938	.42

Upon all of the real estate of Price Hill Colliery Company a lien of J. W. Maxwell for legal services ..... $ 250.00

As against Tracts Nos. 42 to 51, inclusive, of the real estate of Price Hill Col-

liery Company to Ashton File:

(a) Tax subrogation for the years 1937 and 1938 ..... 191.18

(b) Vendor's lien, interest to January 20, 1939 ..... 3,889.50

It is further ascertained, adjudged and decreed by the court that the following leaseholds and leasehold estates, as hereinabove adjudicated of the Price Hill Colliery Company, together with any personal property and fixtures, other than permanent fixtures which are situate on the leased premises or not removed therefrom more than thirty days, are each subject to a lien of the respective landlords as to the respective leases, as hereinafter set forth.

* * *

Tracts Nos. 9 to 17 on the leasehold and leasehold estates from Josephine Tucker and H. J. Tucker:

(a) Amount of royalty due Josephine Tucker $5,845.27

Amount of royalty due H. J. Tucker 6,892.83

(b) Amount of taxes due H. J. Tucker for 1937 ..... 72.50

* * *

The lease and leasehold estates on Tracts Nos. 34-A and 35-A from Ashton File, et als., known as the "Feazelle and Toney Tracts".

a. Amount due for royalty $1,000.15

b. Amount due for taxes for 1937 ..... 138.03

Amount due for taxes for first half 1938 44.87

* * *

On one fan listed under tangible personal property, the conditional sales lien of Robinson Ventilating Company, with interest to January 20, 1939 ..... 265.18

On 6 Diesel Oil Engines, listed above under tangible personal property, with interest to January 20, 1939.....$16,787.39

It is further adjudged, ordered and decreed that for the purpose of paying off, satisfying and discharging the several liens as hereinabove ascertained and adjudged that the proceeds of the sale thereof be marshalled and as to those lands, interests in lands and personal properties or other properties against which there are no specific liens the same be applied first to the payment of the above recited receivership costs and the general liens in the order of their several priorities, including the general cost of these proceedings before any part of the proceeds of the sale of the other lands, interests in lands and other properties are so applied and the residue, if any, shall be first applied to the specific liens in the order of their respective priorities.

* * *

It is, therefore, further ordered and decreed by the Court that the foregoing are valid and subsisting claims against the Price Hill Colliery Company, a Corporation, and that judgment be and the same is hereby rendered in favor of each of said persons for the amounts hereinabove set forth, of equal dignity and priority after the payment of liens, costs, receivership expenses, as hereinabove ascertained and adjudged. (94-98).

The court then proceeded to adjudicate with respect to costs to be paid by Ashton File, as the holder of the vendor's lien, and by the owners of the various leaseholds and leasehold estates and properties located thereon or not removed therefrom more than thirty days, subject to liens for rents and royalties.

It was thereby also adjudicated that Price Hill Colliery Company was unable to pay the various liens, costs and

judgments and directed that its real estate and chattels real, including leasehold estates, be sold upon terms of not less than one-fourth cash on day of sale, and the deferred purchase price be represented by interest-bearing promissory notes of the purchasers in three equal installments payable in six, twelve and eighteen months from date, and that all other properties, consisting of tangible and intangible properties, be sold for cash on day of sale, and appointed Special Commissioners to make sale of such properties.

DECREE OF AUGUST 23, 1939, TO WHICH COUNSEL FOR THE STATE OF WEST VIRGINIA APPEARED AND FILED OBJECTIONS, AND FROM WHICH THE TAX COMMISSIONER APPEALED. (165-171).

As already pointed out, this decree of August 23, 1939, is in no way inconsistent with the above recited decree of March 10, 1939, as will appear from the following excerpts from the decree of August 23rd:

> It is further adjudged, ordered and decreed that after such costs have been pro-rated that there be paid by the said Special Commissioners certain specific liens against certain real estate and tangible personal property sold and confirmed and in accordance with the report of the Commissioner in Chancery and the previous orders and decrees of this court, that is to say:
>
> That the proceeds derived from the sale of the following real and tangible personal property against which there are specific liens as shown by the report of Commissioner H. L. McCreery be first applied to the payment and discharge of such specific liens as follows:
>
> First.—From the sale of six certain Diesel Engines and equipment as shown by said report and decrees,

the amount of the unpaid purchase price and interest thereon under conditional sales contracts between Fairbanks-Morse & Company and Price Hill Colliery Company now due and owing to Municipal Acceptance Corporation as assignee of the said Fairbanks-Morse & Company.

Second.—From the sale of one ventilating fan, the amount or balance due on the conditional sales contract of Robinson Ventilating Company.

Third.—From the sale of real estate, Tracts Nos. 42 to 51, inclusive, subject to the vendor's lien retained in a deed of conveyance for the same from Ashton File and wife to Price Hill Colliery Company, which deed bears date the 2nd day of April, 1928, and is of record in Raleigh County Court Clerk's office in Deed Book 98, at page 552, proceeds of the sale of which will be applied, after deduction of the costs as aforesaid, to the satisfaction or as credited upon the said vendor's lien.

* * *

It is further specifically adjudged, ordered and decreed after the payment of said costs and the payment and satisfaction of specific liens of Municipal Acceptance Corporation, Robinson Ventilating Company and Ashton File, as heretofore and hereinabove provided, that if the residue of the proceeds of said sale shall be in excess of the amount necessary for the payment of such specific liens, that then such residue shall be applied to the proportionate payment of the receivership costs paid and adjudged to be paid in these proceedings to the extent, however, not to exceed a proportionate part of said receivership costs pro-rated among the various items of property of the Price Hill Colliery Company sold and confirmed in these proceedings, and that if after such specific liens shall have been paid there shall be an excess over and above the amount received as the proceeds of the sale of any such item, after the assess-

ment and the payment of the proportionate part of the receivership expenses therefrom, then such amount shall, subject to the provisions of this decree relating to the payment of specific real estate taxes, be paid to the general lien creditors of the Price Hill Colliery Company, as provided for in the decree entered herein on the 10th day of March, 1939.

It is further adjudged, ordered and decreed, however, that before there shall be paid any of the proceeds of the sale of said real estate to said general liens, as provided by said decree of March 10, 1939, that there shall be paid by the said Special Commissioners to the State of West Virginia taxes for the years 1937 and 1938 upon said real estate if the remaining proceeds of such sale, after payments hereinabove provided for, be adequate for that purpose, and if such remaining proceeds be not adequate for that purpose, that then such proceeds be applied to their payment insofar as they are adequate, and the purchaser shall be required, if he so elect to assume the discharge of the balance thereof.

Be it further adjudged, ordered and decreed that after the payment of the general costs, the specific liens, the receivership costs and the direct property tax, as hereinabove provided, that the Special Commissioners be and they are hereby authorized, directed and empowered to make distribution of the residue of the proceeds of the sale of all the properties in these proceedings sold and confirmed among the general lien creditors of the Price Hill Colliery Company, as set forth in the report of the said H. L. McCreery, Commissioner in Chancery, and as provided for in the orders and decrees heretofore entered herein.

STATEMENT OF SEVERAL CLAIMS OF APPELLEES

The several claims of the appellees arose at different times, and under different instruments and will, therefore, be separately stated under appropriate headings.

ERRORS ASSIGNED AND PROPOSITIONS TO MEET THEM

First.—Counsel for the Tax Commissioner state in substance in their brief that the state has the same right and lien against property of the tax debtor for the collection of gross sales and consumers sales taxes that it has for the collection of taxes levied or assessed against specific property, and that no distinction is to be made between the rights of "general lien" creditors and the rights of "specific lien" creditors. (B19).

1. The lien of the state for taxes, levied or assessed against *specific* property, is prior to any and all other liens against such property, whereas the state has only a general lien against the general property of the tax debtor for its indirect taxes.

> *State* v. *County of Kanawha*, 26 W. Va. 159;
> Acts 1937, chap. 106, sec. 12.

2. A lien is either "specific" or "general". A "specific lien" attaches to *specific property* as security for some demand which the creditor has with respect to that property, and specific liens have always been favored by the courts.

A "general lien" is one which the holder thereof is entitled to enforce as security for the performance of *all the obligations*, or *all of a particular class of obligations*, which exist in his favor against the owner of property. General liens are said to be regarded by the courts with jealousy, and are not therefore favored by them.

JONES ON LIENS, (3d ed.) secs. 14, 16-17;
17 R. C. L. 599, sec. 6;
Rohrbach v. *Germaina Fire Ins. Co.*, 62 N. Y. 47, at page 56;
Flanders v. *Aumack*, 67 Am. St. Rep. 504, at pp. 509-510;
Dikeman v. *Jewel Gold Mining Co.*, 13 Fed. (2d) 118;
Steinman v. *Wilkins*, 7 Watts & S 466;
7 WORDS & PHRASES, (1st ser.) 6604.

The United States has not appealed from the adjudication of the rights of the several parties and the priority of their several liens as fixed by the Circuit Court. In fact no exception was filed by the United States to the report of the Commissioner, nor objection made on its behalf to any ruling made or decree entered in the cause. Wherefore, the United States is deemed to have acquiesced in the adjudication of the Circuit Court whereby it held that liens against specific properties created prior to the accrual of the taxes owing and unpaid by Price Hill Colliery Company to the United States are prior and paramount to the lien of the United States for such taxes, and that proceeds derived from the sale of such property must be first applied *pro tanto* to the discharge of such liens. This important adjudication is now in full force and effect as between the United States and the appellees, and also as between the United States and the State Tax Commissioner, because the State Tax Commissioner did not except to the Commissioners' report which found that the lien of the United States for its taxes is prior and paramount to the lien of the State of West Virginia for all taxes claimed by it, other than specific property taxes, which have been paid off and discharged.

We will, however, discuss the validity of the lien of the United States for taxes because it is important to be considered in connection with the questions arising upon this record between the State Tax Commissioner and the appellees on whose behalf this brief is filed, as will hereafter be specifically pointed out.

3. WITH RESPECT TO THE VALIDITY OF THE LIENS OF THE UNITED STATES FOR TAXES.

Under Title 26 U. S. C. A., sec. 1560 (R. S., sec. 3186):

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property whether real or personal belonging to such person."

Under Title 26 U. S. C. A., sec. 1562 (R. S., sec. 3186):

> "Such lien shall not be *valid* as against any *mortgagee, purchaser* or *judgment creditor* until notice thereof has been filed by the collector—(a) Under State or Territorial Laws. In accordance with the law of the state or territory in which the property subject to the lien is situated whenever the state or territory has by law provided for the filing of such notice." (Italics supplied).

The State of West Virginia has by law provided for the filing of such notice in Code 38-10-1 (section 3916). This statute was passed at the regular session of the Legislature of 1927 and appears in chapter 56 of Acts of the Legislature of West Virginia for that year.

Section 3 of that chapter was held unconstitutional in the case of *In Re Dartmont Coal Company*, 46 Fed. (2d) 455.

The present statute, however, omits the objectionable part and is an adequate provision for recordation of federal liens. In *In Re Dartmont Coal Company, supra,* at page 457, the court quoted from the Internal Revenue Bulletin VI, No. 26, in which the remaining portions of this act were held to be "appropriate legislation" referred to in Title 26 U. S. C. A., sec. 1562 (R. S., sec. 3186) quoted above.

4. WITH RESPECT TO THE RIGHT OF THE UNITED STATES TO PRIORITY OVER THE STATE OF WEST VIRGINIA IN DISTRIBUTION OF INSOLVENT'S ASSETS.

Under Title 31 U. S. C. A., sec. 191 (R. S., sec. 3466):

> "Whenever any person indebted to the United States is insolvent or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

A corporation is a "person" within the meaning of this section.

Beaston v. *Farmers Bank,* 9 L. Ed. 1017, 1029.

Under Title 11 U. S. C. A., sec. 21, is found the following:

> "Acts of bankruptcy by a person shall consist of his having * * * (5) while insolvent or unable to pay his debts as they mature procured, permitted or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

It seems therefore that the claim against Price Hill Colliery Company for taxes is such a claim as is accorded priority under the section quoted above. It remains, however, to ascertain the extent of this priority.

A mortgage or any other specific lien against the debtor's property given before the accrual of the right or priority under the statute is superior to the claim of the United States for preference out of the proceeds of such property. *United States* v. *Guaranty Trust Company*, 33 Fed. (2d) 533, affirmed in 74 L. Ed. 556; *Conard* v. *Atlantic Insurance Company*, 7 L. Ed. 189, and see cases cited in 77 L. Ed. at page 774, subdivision "b", GLENN ON LIQUIDATION 734, sec. 516. In *Conard* v. *Atlantic Insurance Company*, *supra*, the court, at page 441, said:

> "But it has never yet been decided by this court that the priority of the United States will divest a *specific lien* attached to a thing whether it be accompanied by possession or not." (Italics ours.)

In GLENN ON LIQUIDATION, sec. 516, treating of the subject of priority as between State and Federal taxes, the author says:

> "* * * When the debtor owes each government for taxes, the creditor to prevail will be the national government; hence, debts due for federal taxes prevail over those due for state taxes.
>
> "But this primacy of debts due the government was only intended to apply to the debtor's assets that were available to his general estate. If, then, there are mortgages upon his property, the government's claim will not prevail over that of the mortgagee; instead, it will *relate only to such funds as the mortgagor's liquidator may realize from the equity of redemption.* (Italics ours).

5. GROSS SALES TAXES AND PENALTIES AND CONSUMERS SALES TAXES OWING TO THE STATE OF WEST VIRGINIA.

(c) Gross Sales tax $7,186.11
Penalties (R. 66) 827.43

$8,013.54

(d) Consumers sales tax (R. 66) ..... 278.06 (66, 94, S22-25).

Since the (c) Gross Sales Tax, and penalties, and the (d) Consumers Sales Tax claimed by the state accrued under different statutes, we will discuss the question of the priority of the right of the state to receive the different taxes and penalties, under its appropriate lettered sub-heading, as shown in the record, (page 66), and as stated above.

(c) First as to the Gross Sales Tax.

A gross sales tax was first imposed by Chapter 110, Acts Legislature 1921, and parts thereof have been amended, or the Act repealed and re-enacted as follows: Chap. 1, Ex. Sess. 1925; Chap. 33, Acts First Ex. Sess. 1933; Chap. 86, Acts 1935; Chap. 106, Acts 1937, and Chap. 120, Acts 1939.

The legislature, for the first time, provided by sec. 12, chap. 106 Acts 1937, Code 11-13-12, that gross sales taxes "shall be a lien upon all property used in the business or occupation upon which such tax is imposed and said lien shall have priority over all other liens and obligations except those due the United States."

So also, the legislature for the first time provided by sec. 17, chap. 33, Acts Ex. Sess. 1933, Code 11-13-17, for priority of the right of the state to receive its taxes due and un-

paid under art. 13, chap. 11 Code, providing for payment of a gross sales tax, in the distribution, voluntary or compulsory, in receivership, bankruptcy, or otherwise, of the estate of corporations.

5. The tax statute in force at the time the different instruments were executed under which the several rights of the appellees arose, gave the state a lien for these indirect taxes "upon all the property of the tax payer", which lien could not, in any way, affect or impair liens and other property rights created or attached prior to the time the state's taxes accrued.

Acts 1925, First Ex. Sess., chap. 1, sec. 11.

I. MUNICIPAL ACCEPTANCE CORPORATION, ASSIGNEE OF FAIRBANKS-MORSE & COMPANY— CONDITIONAL SALE CONTRACTS — DIESEL ENGINES AND EQUIPMENT.

Fairbanks-Morse & Company sold and delivered to Price Hill Colliery Company a set of six diesel engines and equipment by three conditional sale contracts, dated in the years 1929, 1930 and 1931, respectively, which, among other things, provided "that the title and ownership" thereof should remain in the Company until final payment therefor had been made in full by the vendee in accordance with the terms of the contracts, and until final payment had been made of any other sums that might be due the Company by the purchaser. It is stipulated by counsel for appellant:

> "That such contracts were duly and regularly filed in the office of the Clerk of the County Court of Raleigh County, West Virginia, by Fairbanks, Morse & Company, within the time and in the manner provided by law, and were thereafter refiled from time to time as provided by Section 11, Article 3, Chapter 40, Code of West Virginia." (S 2-4)

The notes given by the Colliery Company to Fairbanks-Morse & Company, evidencing the deferred installments of the purchase price, were transferred by it to Municipal Acceptance Corporation, which owned and held all of the unpaid notes at the time the Colliery Company went into receivership, principal and interest amounting to the sum of $16,787.39, (55-63, 69-70), all of which was then due and payable.

These engines and equipment were first sold by the Commissioners subject to the conditional sale contracts, and The New River Company purchased the equity of the Colliery Company therein for $50.00 (112). After such sale was reported to the court one Isador Fried indicated a desire to bid for the property if and when offered for sale free and clear of all liens, and filed an upset bid for the property of $22,100.00 on that basis, and submitted with the bid his check for $5,000.00 as evidence of his good faith. The court thereupon, over the objection and exception of appellee, ordered the property sold accordingly, and Fried became the purchaser thereof for that sum, which was paid in cash and the proceeds are now in the hands of Special Commissioners subject to the order of the court. (144-146).

> "IV. A claim against specific property represented by a conditional sales agreement, purporting to provide for retention of title in the vendor, is in legal effect merely a form of lien or in the nature of a lien, with the title retained only as security." (B 10).

Second.—The right retained by Fairbanks-Morse & Company in the engines and equipment, under the express terms of the conditional sale contracts by which they were sold, was the *title and ownership* thereof until all of the installments of the purchase price were paid. Therefore, such

interest so retained was not "in legal effect merely a form of lien or in the nature of a lien", as contended for by the appellant.

1. Under the terms of the conditional sale contracts, by which the six diesel engines and equipment were sold and purchased, the *Primary* rights of the *Buyer* in the property were that it had the right, *when not in default,* to retain possession of the property and to *acquire the property* in the engines and equipment on the performance of the conditions of the contracts. * * *

Acts 1925, chap. 64, sec. 2;
MICHIE'S ANNO. CODE 1937, chap. 40, art. 3, sec. 2.

2. The *Primary* rights of the *Seller* under these contracts were that the Buyer should be liable to the Seller for the purchase price, or for installments thereof, as the same should become due, and for the breach of all promises made by it in the conditional sale contracts. * * *

Acts 1925, chap. 64, sec. 3;
MICHIE'S ANNO. CODE 1937, chap. 40, art. 3, sec. 3.

3. Section 4, chap. 64, Acts 1925, Code 1937, 40-3-4, provides:

> "Every provision in a conditional sale reserving property in the Seller after possession of the goods is delivered to the Buyer, *shall be valid as to all persons,* except as hereinafter otherwise provided." (Italics ours).

No exception referred to in the foregoing section 4 applies to Municipal Acceptance Corporation, because it complied with all of the provisions of the statute relating to these contracts, so that section 4, chapter 64, Acts 1925, expressly

made every provision of these contracts valid as to all persons, including the State of West Virginia. (S 2-4)

4. The contracts being valid and binding as to all parties, what property right did Price Hill Colliery Company have in these engines and equipment when sold in this cause? They remained the property of the vendor, and by assignment became the property of the assignee, Municipal Acceptance Corporation, until the purchase price was fully paid. Therefore, the only property right which the company ever acquired or held in these engines and equipment was an *equitable property right* to be measured by the amount of the purchase price paid, coupled with the "right to acquire the property in the" engines and equipment "on the performance of the conditions of the contracts",—payment in full of the unpaid installments of the purchase price. The only asset of the company in this property at the time of the sale thereof by the Special Commissioners, was in the proceeds derived from the sale in excess of the amount required to pay to Municipal Acceptance Corporation all of the unpaid installments of the purchase price, together with interest thereon.

LeSage v. *Switzer*, 116 W. Va. 657, at pp. 659-660;

Acts 1925, chap. 64, secs. 2, 3, 4;

Cook v. *Citizens Ins. Co.*, 105 W. Va. 375;

Industrial Bank v. *Holland Furnace Co.*, 109 W. Va. 176, 179;

Robinson v. *Bowe*, 73 Fed. (2d) 238;

In re, Lake's Laundry, 79 Fed. (2d) 326, (cert. denied, 296 U. S. 622, 80 Law Ed. 442);

Harkness v. *Russell*, (U. S.) 30 Law Ed. 285.

5. Sections 2 and 3 of Chapter 64, Acts 1925, specifically fixed the relative property rights of the vendor and the

vendee in the engines and equipment under the conditional sale contracts at the time such contracts were entered into, and Section 4 of the Act expressly provided that such contracts should be valid as to all persons where, as in this case, the vendor complied with the provisions of the Act. Now, therefore, to subject the vested property rights of Municipal Acceptance Corporation in these engines and equipment to the payment of taxes which are not property taxes, but excise taxes which by statute are made the *personal obligations* of the Colliery Company to the State, would:

(a) Violate the obligation of the several conditional sale contracts, so expressly validated by legislative enactment, and thereby contravene the provisions of Section 10, Article I of the Federal Constitution, and of Section 4, Article III of the Constitution of West Virginia, which prohibits the State from passing any law violating or impairing the obligation of a contract; and

(b) Also violate the provision of Section 1 of Article XIV of the Amendments to the Federal Constitution in that it would deprive Municipal Acceptance Corporation of its property without due process of law.

Dartmouth College, 4 Wheat. 518, 4 L. Ed. 629;
Fletcher v. *Peck*, 6 Cranch, 87, 3 L. Ed. 162;
Bronson v. *Kinzie*, 1 How. 311;
Green v. *Biddle*, 8 Wheat. 75;
Bradley v. *Lightcap*, 195 U. S. 1, 27 Sup. Ct. 748;
Home Building & Loan Ass'n v. *Blaisdell*, 290 U. S. 254, (1933);
Sturges v. *Crowinshield*, 4 Wheat. 122, 197, 4 L. Ed. 529;
Ogden v. *Saunders*, 12 Wheat, 354, 356, 6 L. Ed. 606;

W. B. Worthen Co. v. *Thomas*, 292 U. S. 426, 54 S. Ct. 816;
W. B. Worthen Co. v. *Cavanaugh*, 295 U. S. 56, 55 S. Ct. 555 (1934);
Barnitz v. *Beverly*, 163 U. S. 118, 16 S. Ct. 1042;
Honeyman v. *Jacobs*, 306 U. S. 539, 59 S. Ct. 702;
Borough of Fort Lee v. *United States*, 104 F. (2d) 1939;
Ohio Oil Co. v. *Conway*, 281 U. S. 146, 50 S. Ct. 310, affirming 34 F. (2d) 47;
Risley v. *Utica*, 179 F. 875;
United States v. *Billings*, 190 F. 359;
Looney v. *Crane*, 245 U. S. 178, 38 S. Ct. 85 (1917) and cases there cited;
Southern Ry. Co. v. *Greene*, 216 U. S. 400, 30 S. Ct. 287 (1910);
LeSage v. *Switzer*, 116 W. Va. 657, 182 S. E. 797;
Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77, 58 S. Ct. 436, 438 (1938);
Hibernia Mortgage Co. v. *Greco*, 191 La. 658, 186, So. 68;
Barwise v. *Sheppard*, 299 U. S. 33, 57 S. Ct. 70;
Clement National Bank v. *Vermont*, 231 U. S. 120, 34 S. Ct. 31;
North Missouri Ry. Co. v. *Maguire*, 20 Wall. 46, 61, 22 L. Ed. 287, 293.

II. LIENS CLAIMED BY JOSEPHINE D. TUCKER, HENRY J. TUCKER AND ASHTON FILE, RESPECTIVELY, AGAINST CERTAIN PROPERTIES OF PRICE HILL COLLIERY COMPANY FOR UNPAID TONNAGE ROYALTIES ON COAL ACTUALLY MINED AND TAXES WHICH CONSTITUTED A PART OF THE RENT.

The following leases were executed to Price Hill Colliery Company for coal mining purposes by the following named parties, which leases were in full force and effect at the time of the sale of the properties of the Colliery Company by the Special Commissioners:

(a) Josephine D. Tucker, Henry J. Tucker and wife, dated April 2, 1928, for the term until all the merchantable coal was mined. Recorded June 6, 1928, (38-46);

(b) Ashton File and wife, dated May 1, 1924, for the term until all the merchantable coal was mined from the Sewell seam. Recorded June 16, 1924, (17-23);

(c) Same lessors, dated June 20, 1925, same term. Recorded November 30, 1925, (23-28);

(d) Same lessors, dated April 2, 1928, same term, recorded June 6, 1928, Fayette County, August 1, 1928, (28-31);

(e) Same lessors, same term, dated January 1, 1932. Recorded September 6, 1932, (31-37).

Each one of the above recited leases contain the following covenants and conditions expressed in substantially the same language:

> "Tenth. The Lessee shall pay all taxes and assessments that may be levied or assessed against the lands hereinbefore described together with any and

all improvements thereon of the Lessee, its successors or assigns, and upon the coal mined or coke manufactured therefrom during the continuance of this lease, and if any such taxes and assessments are paid by the Lessors, the Lessee shall repay to the Lessors the amount thereof, such amount to be recovered, in default of prompt payment, in the manner provided in the Twelfth Article of this lease.

(omission by stipulation) (176-179)

"Twelfth. It is further agreed that all rents and royalties and other payments herein agreed to be paid shall be deemed and treated as rents reserved upon contract by the Lessors, who reserve to themselves all rights and remedies of landlords under all present and future laws of the State of West Virginia for the collection of the same, including the right of re-entry.

"The Lessors shall have the right of re-entry by reason of any rent or royalty or other payments being in arrear, or by reason of any breach of any covenant herein, in the same manner and with the same effect as is now or hereafter may be provided under the laws of the State of West Virginia.

"All the provisions herein contained for the collection of rents, royalties, or other payments shall be deemed cumulative and not exclusive, and shall not deprive the Lessors of any of their other legal or equitable remedies.

(omission by stipulation)

"Fourteenth. All of the preceding conditions to be kept and performed by the Lessee, and the covenants of the Lessee to perform the same, shall inure to the benefit of the Lessors, their respective heirs and assigns." (43-44, 20-21, 26-27, 29, 35).

The Company was in arrears to the Tuckers for tonnage royalties in the sum of $12,738.10, plus $72.50 taxes which were a part of the rent, and to Ashton File for tonnage

royalties $1,000.15, plus $138.03 taxes, also a part of the rent agreed to be paid. (68). Each of these leases was offered for sale by the Special Commissioners, but no one bid for any of them, and were not, therefore, sold. (109-111, 146-148). A decree entered in this cause June 1, 1939, directed L. E. Gaines and W. H. File, Special Commissioners, to surrender or release these several leases when requested by the several lessors and all of these leases have accordingly been surrendered. (135, 151).

1. Code 37-6-18 gave to Henry J. Tucker and others as lessors under the Indenture of Lease to Price Hill Colliery Company, dated April 2d, 1928, recorded June 6, 1928, a lien for one year's stipulated rents or royalties, whether accrued or not, upon the tenants' goods carried on the leased premises, over all other liens created after the commencement of the tenants' term, though no distress warrant had been issued therefor. And the same is true in regard to each of the several leases from Ashton File and wife to Price Hill Colliery Company, executed and recorded in the years 1924, 1925, 1928 and 1932, respectively.

Anderson v. *Henry*, 45 W. Va. 319, syl. pt. 1;
Huffard v. *Akers*, 52 W. Va. 21;
In re: *Wynne*, 30 Fed. Cas. (No. 18117 D. Va), 752.

2. The several liens given to the different landlords by sec. 18, art. 6, chap. 37, Code, attached *at the commencement of each tenancy* or at the moment chattels were bought on the respective leased premises, and such liens existed by virtue of the statute independently of any method of proceeding for enforcing them .

Anderson v. *Henry*, 45 W. Va. 319;
Pepsi-Cola Bottling Co. v. *Indian Rock Bottling Co.*, 98 W. Va. 269;

Dingess Rum Coal Co. v. *Draper Eagle Coal Co.*, 108 W. Va. 37;
In Re: *Cardwell*, 52 Fed. (2d) 158;
Ginsburg v. *Lindel*, (8th Cir.) 107 Fed. (2d) 721, pts. 4 and 11;
JONES ON LIENS, (3d ed.) sec. 553;
36 C. J., sec. 1461.

3. The Tucker lease to the Colliery Company required the company to pay all taxes and assessments levied or assessed against the lands leased, and upon the coal mined therefrom, during the continuance of the lease, and also provided that "all rents and royalties and *other payments* herein agreed to be paid shall be deemed and treated as rents reserved upon contract by the Lessors, who reserve to themselves all rights and remedies of landlords under all present and future laws of the State of West Virginia for the collection of the same, including the right of re-entry". Substantially the same provisions are contained in each of the several leases from Ashton File and wife to the Colliery Company. Under the terms of these several leases the taxes on the leased premises, assumed to be paid by the company, were a part of the rent.

Woolsey v. *Abett*, (N. J.) 48 Atl. 949;
McCann v. *Evans*, (Pa.) 185 Fed. 93;
In re: *Copping's Estate*, (Tex.) 29 Fed. (2d) 998;
Guild v. *Sampson*, (Mass.) 122 N. E. 712, pts. 4, 5;
Britton v. *Western Iowa Co.*, 9 Fed. (2d) 488, pts. 3, 10;
Perrin & Smith Printing Co. v. *Cook Hotel & Excursion Co.*, (Mo.) 93 S. W. 337;
W. S. Quenby Co. v. *Sheffield*, (Conn.) 79 Atl. 179.

4. The right reserved to the several landlords in each of these leases to re-enter for default in the payment of rent or royalty was a vested property right, and gave to each landlord, in case of such default, the right to re-enter "into and upon the demised premises, or any part thereof, in the name of the whole * * * and the same again have, repossess and enjoy, as of his or their former estate".

Code 36-4-15.

5. The Special Receivers elected to hold the several leases from Tuckers and File to the Company in order that its property and mining plant might be preserved intact for offering for sale as a going mining operation. The landlords were enjoined from distraining for rents and royalties and from interferring with the property of the company, including these leases, brought into the custody of the court by the special receivership. Therefore, the landlords could not be deprived of their right of re-entry except upon condition that the rents and royalties then in arrears were required to be paid.

Parr v. *Blue Ridge Coal Co.*, 72 W. Va. 174, syl. pt. 3;
Pelzel v. *Pen-Mar Coal Co.*, 101 W. Va. 247;
Wood's Appeal, 30 Pa. St. 274;
Escher v. *Harrison Securities Co.*, 79 Fed. (2d) 777;
Bantleon v. *Smith*, 2 Binney 145;
Fleming v. *Fleming Hotel Co.*, (N. J.), 61 Atl. 157;
O'Dell v. *H. B. Altman Co.*, 223 Fed. 292;
CLARK RECEIVERS, 601, sec. 526.

6. The statutory remedy for enforcing a landlord's lien by distress is not exclusive, and the lien held by each of the landlords was enforceable at his instance in this suit, because these leaseholds were brought into the custody of the court

burdened with these several liens, and in the distribution of the property on the leased premises the court was bound to recognize and enforce such liens.

Kahle v. *Oil Co.*, 51 W. Va. 313;
Laidley v. *Kline*, 23 W. Va. 565, syl. pt. 2;
12 ENCY. PL. & PR. 934, sec. 7;
18 AM. & ENG. ENCY. LAW (2 ed.) 351, par. (h);
Berry v. *Berry*, (Kan.) 55 Pac. 348, syl. pt. 2;
Bisbee v. *Mt. Battie Mfg. Co.*, (Me.) 77 Atl. 778, pts. 2, 3;
36 C. J., 528, sec. 1555.

7. The state having only a general lien against the property of the company for the payment of these taxes, in marshalling the assets of the company, the proceeds derived from the sale of its property, against which there were no specific liens, must first be applied to the payment of these taxes, and only in case of a deficiency may money, otherwise applicable to the discharge of one or more specific liens held against specific property, be applied to the payment of such taxes.

Ball v. *Setzer*, 33 W. Va. 444;
Kanawha Valley Bank v. *Wilson*, 25 W. Va. 242, syl. pt. 8;
Wiley v. *Mahood*, 10 W. Va. 206, syl. pt. 8;
Oliver v. *Stovall*, 93 W. Va. 88, syl. pt. 4.

III. VENDOR'S LIEN HELD BY ASHTON FILE

The lien of Ashton File is a vendor's lien regularly retained in a deed from him and wife to Price Hill Colliery Company, dated April 2, 1928, and recorded in Fayette County Court Clerk's office in Deed Book No. 66, page 124, to secure the unpaid part of the purchase money agreed to be paid by Price Hill Colliery Company for the undivided one-half interest in approximately seven hundred acres of

land and mineral conveyed to it by File and wife by the above recited deed. (S 13-15).

The Colliery Company owed Ashton File $3,679.59 (67) on the purchase price of the undivided one-half interest in the land and mineral conveyed to it by the deed of April 2, 1928. (13-15). This undivided interest was sold by the Special Commissioners subject to this lien and certain delinquent taxes and purchased by File for $1.00 subject, however, to such lien and taxes, and such sale was confirmed by decree entered June 1, 1939. (140, 135-136, 106).

> "I. A legislature, in creating a lien for privilege taxes, may make the lien superior to all other liens existing before * * * the enactment of the statute. (B. 8).
>
> * * *

Neither the case of *Trust Company* v. *Hall*, nor *Marshall* v. *New York*, 254 U. S. 380, supports the proposition stated.

In the *Hall* case this court quoted with approval the statement of an eminent author, "It is not only competent for the legislature to provide that taxes shall have a paramount lien upon the lands assessed, but it is within its constitutional power to enact that such liens shall have the precedence over all mortgages or other encumbrances made or given before the enactment of the law creating the tax lien, and existing at the date of its passage". (pp. 689-690). Clearly, the tax referred to is a property tax levied against specific property, whereas, the taxes involved in the case at bar were not levied or assessed against any property nor are they "property" taxes. COOLEY TAXATION, (4th ed.) Sec. 269. Nowhere is it stated that it is competent for the legislature to

provide that the lien of the state for gross sales tax shall have precedence over all mortgages or other encumbrances made or given before the enactment of the law creating the tax lien, and existing at the date of its passage. The only question involved in *Marshall* v. *New York*, 254 U. S. 380, was whether the right of the state to collect its taxes was prior to the rights of common creditors against the tax debtor. The court in its opinion said: "Nor does any question arise as to priority of the state over encumbrances". (p. 382) * * * "Here it is not sought to gain priority over a lien existing at the time when the receiver was appointed; and the priority over unsecured creditors is granted by the common law of New York". (p. 386).

> "(b) Such an act does not impair the obligation of contract in violation of Section 10, Article I, Constitution of the United States, nor Article III, Section 4, of the Constitution of West Virginia." (B 9).
> * * *

Not one of the decisions of the United States Supreme Court cited in appellant's brief under the foregoing subheading "(b)" supports the proposition therein stated.

> "II. * * *
> "(a) It is a general rule that property used in a business may be subjected to a lien for an excise or occupation tax on the business carried on, although it is not owned by the person carrying on the business." (B. 10).

Manifestly, therefore, under the foregoing proposition, the state claims the right to subject any property used in the business of mining and shipping coal to the payment of these indirect taxes, including lands leased to the company for coal mining purposes by virtue of such use in its business, although the Colliery Company had but a leasehold estate therein and that estate subject, under the express terms of

the lease, to be forfeited for the non-payment of rents and royalties.

The tax involved in the case of *Hodge* v. *Muscatine County*, 196 U. S. 276, was a property tax levied and assessed against the property of the taxpayer, and, therefore, has no application to the foregoing proposition.

A glance at many of the cases cited in brief for appellant will at once disclose the statute involved and construed to be radically different from Section 12 as amended in 1937. *State* v. *Wynne*, 133 S. W. (2d) (B 11) will illustrate this statement. Therefore, such cases are inapplicable as authority for the propositions which they are cited to support.

Third.—To subject the property right of Municipal Acceptance Corporation in the diesel engines and equipment to the payment of indirect taxes owing by the Colliery Company to the state, or make the lien of the State of West Virginia for such taxes prior to the rights of re-entry of Tuckers and File under their several leases to Price Hill Colliery Company, and their several liens for unpaid royalties, and to the vendor's lien of Ashton File, all of which were vested property rights prior to the effective dates of the 1937 and 1939 amendments of Section 12, would:

(a) Violate the obligation of the several contracts under which these several property rights were created, and thereby contravene the provisions of Section 10, Article I of the Federal Constitution, and of Section 4, Article III of the Constitution of West Virginia, which prohibit the state from passing any law violating or impairing the obligation of a contract,

(b) Violate the provisions of Section 1 of Article XIV of the Amendments to the Federal Constitution in that it would

deprive these parties of their several property rights without due process of law, and also

(c) Violate Article X of the Constitution of West Virginia in that the state would indirectly lay on or against the property of the several appellees taxes in excess of the taxes authorized by that Article to be laid on or against such property, and take the property to pay such taxes.

See authorities cited under lettered sub-paragraphs "(a)", "(b)" of numbered paragraph 5, pages 24-26.

> "III. The West Virginia Legislature has created a lien in favor of the State for gross sales and consumers' sales taxes, and has in express terms, provided that it take priority over all other liens, whether created prior to or subsequent to the enactment of the statutes." (B 10).
>
> * * *
>
> "V. It was the intention of the legislature that the statutes creating liens in favor of the State of West Virginia for gross sales and consumers' sales taxes (Code, 11-13-12, Chapter 106, Acts, 1937, and Code, 11-15-17, Chapter 108, Acts 1937), should operate retrospectively, and hence those liens rank ahead of and are paramount to the claims against specific property represented by conditional sales agreements, vendor's liens, liens of lessors for rents and royalties, and the laborer's lien involved in the case at bar." (B 11).

Fourth.—Section 12, art. 12, chap. 33, Acts First Ex. Sess. 1933, as amended by art. 13, chap. 106, Acts 1937, to provide that the lien conferred on the state for business and occupation taxes "shall have priority over all other liens and obligations, except those due the United States" is not retroactive in its operation to interfere with vested rights, but is to be applied only to future cases arising after the effective

date of the amendment. And the same is true of the further amendment of this section by chap. 120, Acts 1939, giving the state a lien for tax penalties.

1. A cardinal rule in interpreting statutes is to construe them as prospective in operation in every instance so as not to disturb vested interests, except where the intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the statute, which *would be inoperative* otherwise than retrospectively. In all cases of doubt, every presumption is against the retroactive operation of a statute.

Central Trust Co. v. *Hall*, 106 W. Va. 687;
Stewart v. *Vandervort*, 34 W. Va. 524, syl. pt. 3;
State v. *Mines*, 38 W. Va. 125, syl. pt. 5;
Rogers v. *Lynch*, 44 W. Va. 94, syl. pt. 3;
Jenkins v. *Heaberlin*, 107 W. Va. 287, at page 290;
Gould v. *Gould*, (U. S.) 62 L. Ed. 211, 213;
Shwab v. *Doyle*, (U. S.) 66 L. Ed. 747, pts. 1 and 3; 73 Fed. (2d);
Jones v. *Fidelity & Columbia Forest Co.*, (6th Cir.) 73 Fed. (2d) 446;
Campbell & Co. v. *Nonpareil F. B. & K. Co.*, 75 Va. 291, 298;
Price's Ex'or v. *Harrison's Ex'or*, 31 Gratt. 114, 119-122;
City of Montpelier v. *Senter*, (Vt.) 47 Atl. 392, at p. 393;
COOLEY'S CONST. LIM., (8th ed.) Vol. 2, pp. 772-773;
COOLEY TAXATION, (4th ed.) Vol. 2, sec. 514;
LEWIS SUTH. STAT. CONST., (2nd ed.) Vol. 2, sec. 643.

2. Statutes imposing taxes upon subjects and citizens are to be construed strictly in favor of the taxpayer and against

the taxing power, and are not to be extended by implication beyond the clear import of the language used.

Vinson v. *County Court*, 94 W. Va. 591, syl. pt. 3;
Gould v. *Gould*, (U. S.) 62 L. Ed. 211, 213;
COOLEY TAXATION, (4th ed.) Vol. 2, sec. 514;
Commonwealth v. *Hutzler*, (Va.) 97 S. E. 775;
LEWIS' SUTH. STAT. CONST., (2nd ed.) Vol. 2, sec. 537; 59 C. J., sec. 670.

3. Courts applying the rule of strict construction to revenue laws have uniformly held that although the words of a statute are broad enough, if literally construed, to comprehend existing cases, they must be interpreted as applying to cases that may thereafter arise unless a contrary intention is unequivocally expressed therein.

Rogers v. *Lynch*, 44 W. Va. 94, 97, syl. pt. 3;
Campbell & Co. v. *Nonpareil F. B. & K. Co.*, 75 Va. 291, pt. 3;
Gould v. *Gould*, (U. S.) 62 L. Ed. 211, 214;
Crigler's Committee v. *Alexander's Ex'or*, 33 Gratt. 674, 677.

4. Chapter 106, Acts 1937, amending sec. 12, art. 12, chap. 33, Acts First Ex. Sess. 1933, was passed March 13, 1937, and made effective from passage; and chap. 120, Acts 1939, amending sec. 12, art. 13, chap. 106, Acts 1937 was passed March 2, 1939, and made effective ninety days from passage. The legislature by fixing the day on which these two amendments should become effective thereby stamped the prospective character thereof upon the face of each Act and excluded any intention of the legislature of making either one of the amendments retroactive in its operation.

CONSTITUTION OF W. VA., Art. 6, sec. 30;
State v. *Pinson*, 76 W. Va. 572;
Dewart v. *Purdy*, 29 Pa. St. 113;

LEWIS' SUTHERLAND STAT. CONST., (2d ed.) Vol. 1, sec. 175;
26 AM. & ENG. ENCY. LAW, (2d ed.) 695;
State v. Roney, (O.) 92 N. E. 486, pt. 1;
Thompson v. *Board of Commrs.*, (Kan.) 275 Pac. 205, pt. 1;
59 C. J., sec. 673.

5. The pertinent part of the enacting clause of Chapter 106, Acts 1937, amending and re-enacting sec. 12, art. 13, chap. 11, Code 1931, is:

> "That sections three, twelve * * * article 13, chapter 11, Code West Virginia 1931, as amended * * * be amended and re-enacted to read as follows: The amendment follows.

In the case of *State* v. *Mines*, 38 W. Va. 125, syl. pt. 7, it is held:

> "When a statute is amended and re-enacted with the words, 'so as to read as follows,' or words of like effect, those parts of the re-enactment embraced in the former law are not considered as repealed and re-enacted, but as law all along continuously from their original enactment; *but the new parts are considered as law for the first time from the commencement of the amended act.*" (Italics ours).

6. The rule that laws are not to be construed as applying to cases which arose before their passage is applicable when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money or property in other ways.

> *Lwellyn* v. *Frick*, (U. S.) 69 L. Ed. 934, at page 937, and cases there cited;
> *People* v. *Longhman*, (N. Y.) 164 N. E. 253, pt. 7 and page 257;

Massa v. *Nastri*, (Conn.) 3 Atl. (2d) 839, 841; 59 C. J., 1172-3, sec. 697.

7. "No statute, *however positive*, is to be construed as designed to interfere with *existing contracts*, rights of action, or suits, and *especially vested rights*, unless the intention that it shall so operate is expressly declared; and the courts will apply new statutes only to future cases, unless there is something in the very nature of the case or in the language of the new revision which shows that they were intended to have a retroactive operation." (Italics ours).

Central Trust Co. v. *Hall*, 106 W. Va. 687.

8. There is nothing in the language used either in sec. 12, as amended in 1937, or as amended in 1939, to indicate legislative intent to make the provisions of either of those amendments retroactive. To the contrary, the case of *Central Trust Company* v. *Hall*, *supra*, holding that the lien of the State for gross sales taxes, under the gross sales Act of 1921, did not take priority over a lien created prior to the time that act took effect, was decided by this court February 19, 1929, and the fact that the legislature did not use appropriate language in amending section 12 in 1937 to indicate an intent to make it retroactive in its operation, creates the presumption that the legislature was familiar with the construction thus given by the court to the old act and had that in mind when section 12 was amended and re-enacted by the act of 1937.

Parsons v. *County Court*, 92 W. Va. 490, syl. pt. 4;

Pennington v. *Gillaspie*, 63 W. Va. 541, syl. pt. 1.

Fifth.—If perchance the liens of the State of West Virginia be held to be retroactive, and therefore prior to the several liens of Tuckers and File, then we submit that the state is not entitled to receive any part of the sum of

$23,824.12, (65), or interest thereon, representing the amount of taxes owing and unpaid by Price Hill Colliery Company to the United States, because the United States, and the State of West Virginia, claim taxes as distinct sovereignties under separate tax systems provided for by the Congress of the United States and the Legislature of West Virginia, respectively. The liens of the state for the taxes in controversy are subject and subordinate to the liens of the United States for taxes to the amount of $23,824.12, and interest thereon, found by the Commissioner to be due, owing and unpaid to it by the Colliery Company (65). This proposition is not controverted by the state. The Circuit Court decreed that the several rights of Municipal Acceptance Corporation, Tuckers and File, to receive out of the proceeds of sale of the specific properties covered by the contracts, leases and deed, are prior and paramount to the liens of the United States for its taxes so claimed. The United States has submitted to that adjudication by its failure to appeal from the decree, and that part of the decree is not subject to be disturbed on this appeal of the State Tax Commissioner.

MICHIE'S ANNOTATED CODE 1937, 58-5-25;
Walker v. *Page*, 21 Gratt. 636, pt. 7;
Vance Shoe Co. v. *Haugh*, 41 W. Va. 275, syl. pt. 7 and page 282;
Bowlby v. *DeWitt*, 47 W. Va. 323, syl. pt. 2;
Hyre v. *Johnson*, 107 W. Va. 524, 529-530;
FREEMAN ON JUDG., (Fifth ed.) pp. 2418-19, sec. 1167;
Hanrick v. *Patrick*, (U. S.) 30 L. ed. 396;
Todd v. *Daniel*, (U. S.) 10 L. ed. 1054;
Gilfillan v. *McKee*, (U. S.) 40 L. ed. 161, 164;
3 C. J., 1008, sec. 961.

Wherefore, the State of West Virginia is not entitled to receive, or have applied to the payment of its taxes involved

herein, any part of the sum of $23,824.12, and interest thereon, representing the amount of taxes due the United States, but Municipal Acceptance Corporation, Tuckers and File are entitled under this decree, holding their rights and liens to be prior and paramount to the liens of the United States for its taxes, to receive out of the proceeds derived from the sale of the six diesel engines and equipment, personal properties on the several leased premises, and the undivided one-half interest in the land conveyed to Price Hill Colliery Company, respectively, and have applied to the payment of the balance of the purchase monies owing to them, respectively, and also for rents and royalties, so much of the sum of $23,824.12, and interest thereon, as the United States would have been entitled to receive and have applied to the payment of its taxes if the liens of the United States had not only been prior and paramount to the liens of the State of West Virginia for its taxes, but also prior and paramount to the rights of Municipal Acceptance Corporation and Tuckers and File.

This distribution will not affect the state because its liens for taxes are expressly made secondary and subordinate to the liens of the United States for its taxes.

ARGUMENT

The major question involved here is by no means a new problem. The appearance of man on the dim horizon of the past is marked by his protest against the oppression of the tax gatherer, and the rise and fall of the varied civilizations through which he has since passed, is told in the history of his relative successes and failures to stay the power of the state to destroy, by unwise and unjust taxation.

On what principle of justice and fair dealing does the state base its contention that this tax statute should be con-

strued to be retroactive in its operation, and in effect confiscate and appropriate to the use of the state vested private property vouchsafed to its citizens by its laws in force when such rights were acquired, and under which they were held for many years prior to the adoption of this amendment by which the state now seeks to expropriate these property rights? The only answer to this important question, found in the brief of the Attorney General, is that the property rights of citizens of the state are swallowed up in the sovereign power of the state to tax, and that merely begs the proposition involved.

We venture the statement that if the members of the 1937 Legislature, that passed this amendment, had known that the state would claim that such amendment should be construed to be retroactive in its operation to destroy vested property rights, it would not have gotten beyond the committee; or if reported out by the committee, to use the vernacular of the street, it would have been "beaten to a frazzle".

There is nothing in this amendment of section 12 to indicate a legislative intent to make it retroactive, and in the absence of such provision the law is plain and well settled that it is not to be construed to be retroactive to interfere with vested property rights, but must be held to apply only to future cases arising subsequent to the time the amendment was passed.

The Supreme Court of the United States, in the case of *Lewellyn* v. *Frick*, 69 L. Ed. 934, at page 937, discussing this question, in its opinion said:

> "Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that laws are not to be considered as applying to

cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways."

In the case of *Massa* v. *Nastri*, 3 Atl. (2d) 839, the Supreme Court of Connecticut, held, syl. pt. 7:

"A statute will not be given a retroactive construction by which it will impose liabilities not existing prior to its passage."

And in its opinion on page 841, the court said:

"A statute will not be given a retroactive construction by which it will impose liabilities not existing prior to its passage. 'Laws which create new obligations * * * because of past transactions, have been universally reprobated by civil and common law writers, and it is to be presumed that no statute is intended to have such effect, unless the contrary clearly appears.' Pignaz v. Burnett, 119 Cal. 157, 160, 51 P. 48, 49; In re Estate of Parker, 200 Cal. 132, 142, 251 P. 907, 49 A. L. R. 1025; 59 C. J. 1172. The rule that laws are not to be construed as applying to cases which arise before their passage is applicable when to disregard it would impose an unexpected liability that if known might have caused those concerned to avoid it."

The Supreme Court of New York, in the case of *People* v. *Loughman*, 164 N. E. 253, held, syl. pt. 7:

"General principle that laws are not to be construed as applying to cases which arose before their passage is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways."

The court in its opinion, at pages 256-257, said:

"If we construe the statute as intended to apply to

corporations which had already obtained a conditional sanction to do business in the state, then this relator is subjected to inequality by reason of an unexpected change in conditions under which such sanction was offered and accepted. The measure of the obligation is changed after the obligation has been assumed. The circumstances that liability to pay ar increased tax is based upon a transaction already completed might, indeed, raise doubt as to the power of the state to impose such liability. The statute should be construed in such manner as to free it from such doubt. *The state should not be subjected to a justified charge of unfairness.* 'The general principle "that the laws are not to be considered as applying to cases which arose before their passage" is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways.'" (Italics ours).

CONSTITUTIONAL QUESTIONS INVOLVED

It is only by virtue of a statute first enacted in 1933 that the Commissioner now contends, *first*, that the state has a lien, prior to the right of the conditional seller under its retained title to have the balance of the purchase price paid, for taxes assessed not against the seller and not against the property contracted to be sold, but against the buyer in connection with an unrelated subject of tax, and *second*, that this lien is so far retroactive, by implication, as to be prior to the conditional seller's right under contracts executed and recorded long before the enactment of the statute creating both the purported lien and the priority. It is only by virtue of the same statute that he now claims not only priority, but retroactive priority, as against the rights of the other appellees under the deed of conveyance and the several leases.

In both of these aspects the statute, if it means what the Commissioner contends, infringes upon rights vested in and guaranteed to these appellees by both Federal and State Constitutions, in that it impairs the obligations of the conditional sale contracts, deed of conveyance for land and mining leases, and deprives the appellees of their property without due process.

Of course, the invalidity of state statutes which abrogate or impair the obligation of both private and public contracts goes back to such earlier cases as the *Dartmouth College* case, 4 Wheat. 518, 4 L. Ed. 629, and *Fletcher* v. *Peck*, 6 Cranch. 87, 3 L. Ed. 162; and as applied to mortgages and other contracts securing indebtedness to *Bronson* v. *Kinzie*, 1 How. 311 and *Green* v. *Biddle*, 8 Wheat. 75.

A number of these earlier cases are reviewed by MR. JUSTICE SHIRAS in *Barnitz* v. *Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, and by MR. CHIEF JUSTICE FULLER in *Bradley* v. *Lightcap*, 195 U. S. 1, 27 Sup. Ct. 748. Any doubt that these constitutional limitations still exist in case of an attempt to give retroactive effect to a statute changing lien priorities will be resolved by a study of the cases sometimes cited, mistakenly, in support of the argument that under the later decisions a new and more liberal rule as to the right of state legislatures to impair contract obligations has been established. Perhaps the case most often cited in this connection is *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 254, 398, S. Ct. 231 (1933).

Since the *Blaisdell* case the Supreme Court repeatedly has condemned statutes altering substantive rights, including the means of enforcing those rights afforded to the creditor under his contract. Thus in *W. B. Worthen Co.* v. *Thomas*,

292 U. S. 426, 54 S. Ct. 816, the Court referred to the *Blaisdell* case and said:

> "This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the State is entitled to direct its legislation. Accordingly, in the case of Blaisdell, we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed.
>
> "In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances or need. We find the legislation, as here applied, to be a clear violation of the constitutional restriction."

Likewise in *W. B. Worthen Co. V. Cavanaugh*, 295 U. S. 56, 55 S. Ct. 555 (1934) in the opinion of MR. JUSTICE CARDOZO, the Court as to change of substance as compared with change of remedy, said:

> "In the books there is much talk about distinctions between changes of the substance of the contract and changes of remedy. (citing cases). The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. (citing cases). We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower. The case does

not call for definition more precise. A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. *With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor.*" (Italics supplied).

As lately as April 17, 1939, in *Honeyman* v. *Jacobs*, 306 U. S. 539, 59 S. Ct. 702, the Court has adhered to the settled proposition that under the contract clause the legislature may neither impair the substantial rights of the contracting parties, nor under the form of modifying their remedies so reduce the remedies to a shadow as to make the rights themselves of no avail. In this opinion, by MR. CHIEF JUSTICE HUGHES, the Court after referring to numerous cases on this point, said:

> "As we said in Richmond Mortgage Corporation v. Wachovia Bank, 300 U. S. 124, 128, 57 S. Ct. 338, 339, 81 L. Ed. 552, 108 A. L. R. 806. 'The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right' "

The appellant's argument in this connection cannot be pieced out by the suggestion that the taxing power of the state is an unlimited one to which the provisions of Section 1 of Article X and the Fourteenth Amendment of the Federal Constitution do not apply. Granting for purposes of argument that the contract and due process clauses (and similar provisions of the West Virginia constitution) have no power over and constitute no limitation on the taxing power of the state government to levy excise taxes (in the

sense only that the taking of property under the power of taxation properly exercised does not constitute a taking without due process, however great the hardship or unequal the burden) it by no means follows that even the taxing power of the State is free from constitutional limitations. To the contrary, that power must be exercised so as not to deprive any person of property without due process or impair contract obligations existing before the authority for the tax came into existence; and this is true even though the power to tax when properly exercised be regarded as an unlimited one. This proposition is so fundamental that it seems hardly necessary to detain the Court with discussion of it. Among the numerous cases which establish it, in so far as the limitations of the Federal Constitution are concerned, are:

Ohio Oil Co. v. *Conway*, 281 U. S. 146, 50 S. Ct. 310, affirming 34 F. (2d) 47;
Risley v. *Utica*, 179 F. 875;
United States v. *Billings*, 190 F. 359.

There is also the long line of cases dealing primarily with state taxation of foreign corporations in which the Supreme Court has held that the power to tax property outside of and beyond the jurisdiction of the State must be regarded as limited not only by the commerce clause, but also by the due process clause of the Fourteenth Amendment. *Looney* v. *Crane*, 245 U. S. 178, 38 S. Ct. 85 (1917) and numerous cases there reviewed.

See also to the same effect *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 30 S. Ct. 287 (1910).

For similar reasons this statute, if to be construed as appellant contends, is repugnant to the due process and contract clauses of the Constitution of West Virginia. We need but refer to the late case of *LeSage* v. *Switzer*, 116 W. Va.

657, 182 S. E. 797, in which this Court after reviewing both the Federal and the West Virginia decisions on the subject, said:

> "We recognize a nice distinction between the obligation of a contract and its remedy. Where the obligation is not impaired, the remedy may be reasonably modified 'as the wisdom of the nation shall direct.' Sturges v. Crowinshield, 4 Wheat. 120, 200, 4 L. Ed. 529; Wade on Retroactive Law, Sec. 224; 12 C. J., subject, Constitutional Law, Sec. 757; Cooley, supra, p. 554 et seq. Pursuant to that qualification the Minnesota Mortgage Moratorium Law was upheld in Home B. & L. Ass'n v. Blaisdell, 290 U. S. 398, 88 A. L. R. 1481. That decision, however, expressly repudiates any inclination whatever to permit legislative destruction of contracts."

Whether this statute violates the constitutional rights of these appellees must be determined from what it does to them, and to the security for the debts of the principal defendant to them afforded by their contracts, and which the statute as construed by the Commissioner would destroy. The impairment or destruction of the rights of these appellees cannot be justified on the plea that the statute is in general a beneficial one or that the general public good may be served by making the lien it creates superior to already vested private property rights, or by extending the lien of a tax against the defendant Colliery Company to appellees' property. As the Supreme Court said in condemning a California statute because of its impairment of rights guaranteed by the Fourteenth Amendment. *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 58 S. Ct. 436, 438 (1938):

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the in-

> cidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state."

In so far as appellant attempts by reference to such cases as *Hibernia Mortgage Co.* v. *Greco*, 191 La. 658, 186 So. 68, pp. 24, 25 of his brief, to anticipate the foregoing fundamental flaws in the statute, his argument simply begs the question. We are not here dealing with an attempt by the State to impose a property tax upon the property subject to appellees' conditional sale agreements, vendor's lien and lessor's liens, or upon the rights of appellees in that property. Nor are we dealing with the respective priorities of appellees' liens or other rights and interests, and a tax upon either the property itself or those respective rights and interests therein, if the State had even attempted to impose such tax. It may be conceded for purposes of this discussion that all persons, including appellees, dealing with the property or acquiring any rights and interests therein, did so subject to the paramount power of the State of West Virginia, to impose taxes upon that property and upon any rights and interests so acquired, or upon transactions as such in the property, if it should see fit to exercise such power. This is to say what needs no explanation, that we are not arguing the elementary proposition that one taking a mortgage, for example, upon property does so subject to the paramount power of the State to tax the property itself, or either the mortgagor's or the mortgagee's interest therein.

That unquestioned and elementary proposition, however, does not relieve the State of the obligation, in exercising the power, to proceed in accordance with the limitations imposed by the contract and due process clauses of both State and Federal Constitutions. The question always is, not whether the State has the power, but whether in exercising

the power it has observed these limitations, i. e., whether it actually has imposed a tax, or in the guise of a tax has done that which amounts to an impairment of the obligations of a contract, or has taken A's property in the guise of a tax against B, or otherwise has confiscated the property of A or any other citizen without observing the requirements of due process of law. To suggest that in the exercise of the taxing power the State is forbidden to impair the obligations of its own contracts, but may interfere at will with contracts between its citizens, and deprive the citizen not only of the form of his remedy upon his contract, but also of its substance, is not only to beg the question, but is to make abstruse, technical and difficult that which is essentially very simple.

No better authority for the position of appellees on this point could be found than such cases as *Hibernia Mortgage Co.* v. *Greco*, *supra*, and the decisions of the Supreme Court of the United States, which are discussed therein. No better statement of the general rule could be found than the following statement in the opinion:

> "The general rule, that a statute which destroys or impairs the means or remedy for the enforcement of the obligation of a contract impairs the obligation itself, and is therefore violative of the contract clause, in the Constitution of the United States, is not disputed. Any such impairment of the obligation of a contract between individuals, or between private corporations, or between an individual and a private corporation, is within the prohibition of the Constitution, if the statute is not merely a taxing statute but is one which directly affects the means or remedy for enforcing the obligation. Walker v. Whitehead, 16 Wall. 314, 83 U. S. 314, 21 L. Ed. 357."

Similarly as to the decisions of the Supreme Court of the United States which are cited and discussed in the opinion. The latest of them is *Barwise* v. *Sheppard*, 299 U. S. 33, 57 S. Ct. 70, and the earlier decisions are cited in a footnote to the case, 299 U. S. 40, 57 S. Ct. 73. As appears from those decisions and as the Court pointed out in *Clement National Bank* v. *Vermont*, 231 U. S. 120, 34 S. Ct. 31, the question is, does the particular statute in question actually impose a tax on property, in the exercise of a power subject to which the right in the property was acquired; or does it act upon the contract of which that property happens to be the subject matter? Thus in the *Clement* case, which established the right of the States to tax national bank deposits, it appeared that the statute did not act upon the contract between the bank and the depositor, but imposed a tax on the property of the depositor, in the exercise of a power subject to which the deposit was made—a situation similar to that dealt with in the early case of *North Missouri Ry. Co.* v. *Maguire*, 20 Wall. 46, 61, 22 L. Ed. 287, 293. If the position of the appellant in this case is sustained the State of West Virginia will not have done what was held valid against constitutional objection in the cases cited. It will not have taxed the property subject to appellees' rights and interests, or those rights and interests, or the transactions pursuant to which those rights and interests were created, or any other right or interest in that property, subordinating those rights and interests to the power thus exercised. To the contrary, the State in the guise of a tax on transactions of the principal defendant with which the property subject to appellee's liens had and has nothing to do, and which took place long after the rights and interests of appellees attached, will have destroyed the contracts between the principal defendant and the appellees, together with the means

of enforcing the obligations thereof, without process of law. And when we look to the statutory authority whereby it is asserted that the State exercised such power we find that it rests in a statute enacted long after those rights and interests attached, without anything whatever in the statute itself indicating a legislative intent that it should operate retroactively.

No such power or authority is reserved to the State; and any such exercise of it, even if reserved, is clearly beyond even the most liberal view of the relations between state taxing power on the one hand and the contract and the due process clauses of State and Federal Constitutions on the other.

There are other aspects to the momentous questions arising in connection with the construction to be given to the 1937 amendment of section 12, which many times transcend, in importance to the state, the taxes it now seeks to collect. The coal industry of this state is now, and has been for many years, staggering under the burdens and handicaps of unusually heavy taxation; loss of markets to other fuels; competition within the industry, and the constantly growing demands for increased expenditures to mechanize mines in order to reduce the cost of production, and thereby enable the producers in West Virginia to compete in domestic and foreign markets with the coal producers of other states and foreign countries. The inherent hazards of the industry have made it difficult, under favorable conditions, for coal companies ordinarily well financed, to borrow money for plant expansion or to purchase necessary new machinery and equipment. This lack of credit has been largely overcome by the almost universal practice (a) of purchasing new machinery and equipment under conditional sale contracts, and (b) by indulgences extended by landlords in not exact-

ing payment of rents and royalties, in times of financial stress, as nominated in the leases. The vendors have relied on their reservations of title, and the landlords on their liens and rights of re-entry conferred by Code 37-6-18, and 36-4-15, as security for payments to them, and have heretofore been regarded by them as good security therefor. Now, therefore, if section 12 of this statute as amended in 1937 is to be given the construction contended for by the Attorney General on this appeal, then these avenues of credit will of necessity be withdrawn, and the coal companies thereby reduced to the status of beggars in the marts of trade, and their employees forced on the relief rolls of the state.

The circumstances of the financial problems of the Colliery Company, disclosed by this record, graphically demonstrate the verity of the foregoing statements.

This company was largely in arrears in tonnage royalties in the year 1937, and if its landlords had required payment thereof as they fell due, it would have been driven out of business and these indirect taxes would not have accrued.

If Municipal Acceptance Corporation had repossessed the diesel engines and equipment, as it had the contractual right to do, when the Colliery Company first defaulted in the payment of installments of the purchase price, these taxes would not have accumulated, because the company could not have operated without them, and its employees would have gone on the relief rolls at a cost to the state many times greater than the taxes sought to be collected.

Yea, if the state had attempted to enforce payment of these taxes, and other taxes owing to it by the company at the end of September, 1937, the company would have been forced to the wall. Instead, the state recognized its financial difficulties and permitted these taxes to accumulate

rather than force it out of business, and its employees on the relief rolls by attempting to collect such taxes.

Manifestly, the state stands at the cross roads with one of its major industries, and the future of that industry hangs largely in the balance. Comparatively little may be lost to the state by construing the 1937 amendment of section 12 to be prospective only in its operation, and therefore, inoperative to disturb vested property rights acquired upon the faith of the law in force at the time such property rights were acquired. On the other hand, to construe this statute as being retroactive in its operation, the state, by one fell swoop, would strike down vested property rights and bring about a stampede of secured creditors of coal companies, and vendors of all kinds of machinery and equipment under conditional sale contracts, to collect on all obligations, and re-possess all such properties, in every case of default in payment, with the inevitable result that coal companies would be driven out of business by the wholesale and relief rolls of the state crowded with honest toilers likewise forced out of employment.

True, taxes are important to the state, but gainful employment of labor, and the success or failure of a major industry, are equally important to the state. Nothing is to be gained by strangling "the goose that lays the golden eggs", even though the state, because of depressed economic conditions, may not at times be able to get all of the eggs that may be laid.

Should this amendment be given the construction contended for by the Attorney General on this appeal, then the plight of the coal industry may well be expressed in the language of the immortal Shakespeare:

"You take my house, when you do take the prop

That doth sustain my house; you take my life,
When you do take the means whereby I live."

The scope and length of this brief has not, in any way, been prompted by doubt or misgivings on our part as to how this court will construe this amendment of section 12. The apparent zeal with which the Attorney General is urging upon the court the construction of this statute contended for by him, has led us, in our efforts to be of some assistance to the court, to thus present this cause in all of its phases as we understand it.

Returning now to the question of how this statute should be construed. Any tax statute, however plain, made retroactive in its operation would mark a new and radical departure from the traditional tax policy of this state, because all such statutes are generally regarded as being contrary to the principles of representative government.

A most exhaustive search of the proceedings had in the legislature in regard to this amendment, as disclosed by the journals of both the House and Senate, fail to disclose the slightest evidence that any member of either House understood that the statute was intended to be retroactive in its operation, and there is manifestly nothing in the language of the amendment indicating such legislative intent.

In conclusion, the proposition is self evident that "*montani semper liberi*" means more than freedom of the person. It also means freedom from invasion by the state of vested property rights acquired and held upon the faith of the laws in force when such rights were acquired.

Manifestly, neither the 1937, nor the 1939 amendment of section 12 is retroactive in its operation; therefore, to the end that justice may be done, we respectfully submit that

the decrees made and entered in this cause by the Circuit Court of Raleigh County, March 10 and August 23, 1939, in so far as they adjudicate the respective rights and interests of these appellees, should be affirmed.

Respectfully submitted,

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